

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

Eolas Technologies Incorporated,

*Plaintiff,*

vs.

No. 6:09-cv-00446-LED (filed Oct. 6, 2009)

Adobe Systems Inc.; Amazon.com, Inc.; Apple  
Inc.; CDW Corp.; Citigroup Inc.; eBay Inc.;  
Frito-Lay, Inc.; The Go Daddy Group, Inc.;  
Google Inc.; J.C. Penney Corporation, Inc.;  
JPMorgan Chase & Co.; New Frontier Media,  
Inc.; Office Depot, Inc.; Perot Systems Corp.;  
Playboy Enterprises International, Inc.; Rent-A-  
Center, Inc.; Staples, Inc.; Sun Microsystems,  
Inc.; Texas Instruments Inc.; Yahoo! Inc.; and  
YouTube, LLC,

*Defendants.*

Adobe Systems Inc.; Amazon.com, Inc.; Apple  
Inc.; CDW LLC; eBay Inc.; Frito-Lay, Inc.; The  
Go Daddy Group, Inc.; Google Inc.; J.C. Penney  
Corporation, Inc.; JPMorgan Chase & Co.; New  
Frontier Media, Inc.; Office Depot, Inc.; Perot  
Systems Corp.; Playboy Enterprises  
International, Inc.; Rent-A-Center, Inc.; Staples,  
Inc.; Oracle America, Inc. f/k/a Sun  
Microsystems, Inc.; Texas Instruments Inc.;  
Yahoo! Inc.; and YouTube, LLC,

*Counterclaimants,*

vs.

Eolas Technologies Incorporated,

*Counterdefendant.*

**DEFENDANTS' REPLY IN SUPPORT OF PARTIAL SUMMARY JUDGMENT OF  
INDEFINITENESS [DOCKET NO. 568]**

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**EXHIBITS<sup>1</sup>**

- Ex. J: Letter from plaintiff stating that “it will no longer assert the following claims against any Defendant in the above-captioned matter: U.S. Patent No. 5,838,906: Claims 12 and 14; U.S. Patent No. 7,599,985: Claims 29, 30 and 31” (Feb. 18, 2011)
- Ex. K: Letter from plaintiff stating that “claims 24 and 28 are claims in which the software-related limitations are satisfied solely by software plug-ins or the executable application.” (Feb. 11, 2011)
- Ex. L: Plaintiff’s infringement contentions for the ’985 patent against Adobe Systems Inc., one of the few “software” defendants in the case (Mar. 5, 2010)
- Ex. M: Plaintiff’s infringement contentions for the ’906 patent against Perot Systems Corp., one of the many “website” defendants in the case (Mar. 5, 2010)

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<sup>1</sup> Exhibits A to I were attached to Defendants’ opening brief (Feb. 4, 2011) [Docket No. 568].

**REPLY**

The Court should grant partial summary judgment of indefiniteness with respect to claims 6–8 and 13–14<sup>2</sup> of the '906 patent and claims 16–31 and 40–43 of the '985 patent.

**A. The following claims are indefinite under IPXL: '906 claims 6–8 and 13–14, and '985 claims 28–31**

Last week the Federal Circuit reaffirmed the rule that a claim is indefinite if it covers both an apparatus and a method of use. *See In re Katz Interactive Call Processing Patent Litig.*, \_\_\_ F.3d \_\_\_, No. 2009-1450, 2011 WL 607381, at \*9 (Fed. Cir. Feb. 18, 2011) (relying on *IPXL Holdings, LLC v. Amazon.com, Inc.*, 430 F.3d 1377, 1384 (Fed. Cir. 2005)). In *Katz*, the Federal Circuit held that “[the asserted claims] create confusion as to when direct infringement occurs because they are directed both to systems and to actions performed by ‘individual callers.’ [The asserted] claims therefore fall squarely within the rationale of *IPXL* and are indefinite.” *Id.* The holding in *Katz* directly supports Defendants’ indefiniteness argument. *See* Mot. at 5–6.

Eolas is incorrect that “Defendants argue that the active language used in claims 6–8 of the '906 patent (*‘for causing’*) and claim 28 of the '985 patent (*‘operable to’*) import *method* steps into *apparatus* claims.” Opp’n at 3.<sup>3</sup> To be clear, Defendants’ argument is not based on the use of “for causing” or “operable to,” but on method steps in separate “wherein” clauses, as in *Katz* and *Ariba*. *See* Mot. at 5–6. Defendants recognize that claims that describe the *capabilities* or *function* of an apparatus are not prohibited by *IPXL* or *Katz*. Thus most of Eolas’s brief is wasted trying to defeat an argument that Defendants are not making. *See* Opp’n at 2–5.<sup>4</sup>

The method steps in claim 28 of the '985 patent do not describe the *capabilities* or

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<sup>2</sup> Eolas is no longer asserting claims 12 and 14 of the '906 patent, *see* Ex. J, so Defendants hereby withdraw without prejudice their motion for summary judgment that those claims are insolubly ambiguous about whether the “additional instructions” must reside on the “network server” or the “client workstation,” thus shortening Defendants’ opening brief from 13 pages to 11 pages. *See* Mot. at 1–3.

<sup>3</sup> Unless stated otherwise, all emphasis in quotes throughout this brief has been added.

<sup>4</sup> Two of the cases cited by Eolas do not even address invalidity at all: *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1205 (Fed. Cir. 2010) and *Fantasy Sports Props. v. Sportsline.com, Inc.*, 287 F.3d 1108, 1117–18 (Fed. Cir. 2002).

*function* of the claimed apparatus. The claimed apparatus is an “executable application,” as Eolas recently emphasized in a letter to Defendants: “[C]laims 24 and 28 are claims in which the software-related limitations are satisfied *solely* by software plug-ins or the *executable application*.” Ex. K. For example, Eolas has accused Adobe Acrobat of being an “executable application.” See Ex. L at 202–03. But all of the method steps in claim 28 must be performed by a separate “*browser*,” not the claimed “executable application.” See Fact No. 4 (“is utilized by the browser to identify and locate,” “is automatically invoked by the browser,” etc.). Claim 28 violates the rule of *IPXL* because it is unclear whether infringement would occur upon making/using/selling the accused “executable application” (e.g., Adobe Acrobat) or only after the separate “*browser*” has used the executable application to perform the claimed method steps: “The problem is that one of the key elements of [the claim] is a method step that is conducted by some person or system *other* than the claimed device.” *Ariba, Inc. v. Emptoris, Inc.*, No. 07-90, 2008 WL 3482521, at \*7 (E.D. Tex. Aug. 7, 2008) (Clark, J.) (granting summary judgment of indefiniteness). Eolas tries to distinguish *Ariba* on the basis that “human action was explicitly required by the language of the claims,” Opp’n at 5–6, but the quote above from *Ariba* shows that the holding did not turn on whether there was “human action,” but rather whether “a method step . . . is conducted by some person *or system other* than the claimed device.”

Claim 6 of the ’906 patent violates the rule of *IPXL* for similar reasons. The claimed apparatus is “[a] computer program product,” but all of the method steps in claim 6 must be performed by a “browser.” See Fact No. 3 (“utilized by said browser to identify and locate,” “is parsed by said browser to automatically invoke,” etc.). Eolas has asserted that a website is a “computer program product.” See, e.g., Ex. M at 107 (“Perot Systems’ website comprises a computer program product”). Claim 6 violates the rule of *IPXL* because it is unclear whether infringement would occur upon making/using/selling the accused website, or only after the separate “browser” has used the website to perform the claimed method steps. Indeed, most of the 21 defendants in this case *only* operate websites; they do not make or sell browsers. Again, “[t]he problem is that one of the key elements of [the claim] is a method step that is conducted

by some person or system *other* than the claimed device.” *Ariba*, 2008 WL 3482521, at \*7.

In short, the method steps to be performed by the *browser* do not describe the capabilities or function of the alleged “executable application” in claim 28 of the ’985 patent (e.g., Adobe Acrobat), or the alleged “computer program product” in claim 6 of the ’906 patent (e.g., a website). But at the same time, the steps performed by the browser cannot be ignored. Indeed, the parties have agreed that the “identify and locate” step in every claim is “performed *by the browser*.” Ex. F at 3. Furthermore, the Summary of the Invention declares that “[t]he present invention provides a *method* for running embedded program objects in a computer network environment,” Ex. B at 6:50–:52, and the specification states that the flowcharts in Figures 7–8 illustrate “the *method* of the present invention,” Ex. B at 13:63–:64. Figure 8A, for example, provides a flowchart of the steps taken by the *browser* to “automatically invoke” the executable application. Finally, the applicants emphasized the importance of the steps performed by the browser to secure allowance of all their claims. For example, during prosecution, the applicants repeatedly overcame prior-art rejections by pointing to the the “automatically invoking” step performed by the *browser*. See Defendants’ Claim Construction Brief at 7–8 & n.6 [Docket No. 569]. For all of these reasons, it is unclear whether infringement would occur upon making/using/selling the accused apparatus (e.g., Adobe Acrobat or a website), or only after a browser has performed the claimed method steps that were essential to patentability. That is precisely the type of confusion that resulted in the indefiniteness rulings in *IPXL* and *Katz*.

**B. If § 112, ¶ 6 does not apply, then the following claims are indefinite because they use purely functional language: claims 6–8 and 13–14 of the ’906 patent, and claims 16–31 and 40–43 of the ’985 patent**

In response to Defendants’ arguments about indefiniteness due to functional claiming, Eolas cites 18 cases, but only seven of those cases actually considered an indefiniteness argument under § 112, ¶ 2 based on functional claiming.<sup>5</sup> Four of those cases (*Halliburton*,

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<sup>5</sup> Eolas’s brief spends almost four pages arguing why § 112, ¶ 6 should not apply. See Opp’n at 6–9. That is a claim construction issue that the parties addressed in their claim construction briefs, see Docket Nos. 537, 569, 581, so Defendants will not address those arguments here. Eolas’s four-page argument on § 112, ¶ 6 appears to be an inappropriate attempt to circumvent the Court’s page limits on claim construction briefs. See Docket No. 249 (“Motions to extend

(Footnote continued)



*Aristocrat, Miyazaki, and Rodriguez*) found claims indefinite, as discussed in Defendants' opening brief. *See* Mot. at 9–11. The other three cases are distinguishable because they did not consider anything like the broad functional language at issue in this case (“enabling,” “in order to cause,” “operable to cause,” and “for causing”).<sup>6</sup> *See* Fact Nos. 8–14. The functional language here makes it impossible to discern what is actually being claimed. For example, Eolas asserts that independent claims 24 and 28 of the '985 patent “are satisfied *solely* by software plug-ins or the executable application,” while independent claims 20 and 40 of the '985 patent “are satisfied *solely* by server software.” *See* Ex. K. Yet every claim includes numerous limitations concerning a *browser* application, and as noted above it was on the basis of those browser limitations that the claims were allowed during prosecution. Thus it is indefinite what these claims cover. These claims suffer from “the overbreadth inherent in open-ended functional claims . . . which effectively purport to cover any and all means so long as they perform the recited functions.” *Halliburton*, 514 F.3d at 1256 n.7.

C. **If § 112, ¶ 6 applies, then the following claims are indefinite under *Aristocrat*: claims 6–8 and 13–14 of the '906 patent, and claims 16–31 and 40–43 of the '985 patent**

In response to Defendants' arguments concerning *Aristocrat Technologies Australia PTY Ltd. v. International Game Technology*, 521 F.3d 1328, 1332–38 (Fed. Cir. 2008), Eolas merely states that “the corresponding structure for these claims is found in the patents' specifications.” Opp'n at 10. Tellingly, Eolas's brief does not say where the relevant algorithm is found. Neither does Exhibit A to the Joint Claim Construction Statement. *See, e.g.*, Ex. H at 7, Nos. 4–5. Thus if § 112, ¶ 6 applies, it is clear these claims are indefinite under *Aristocrat*.

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page limits will only be granted in exceptional circumstances.”). Eolas's brief also cites a case about the “best mode” requirement under § 112, ¶ 1, but that is not the same as the “definiteness” requirement under § 112, ¶ 2. *See Fonar Corp. v. Gen. Elec. Co.*, 107 F.3d 1543, 1548–50 (Fed. Cir. 1997) (upholding jury verdict of no “best mode” violation).

<sup>6</sup> *See Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1332 (Fed. Cir. 2010) (“not interfering substantially”), *reh'g denied*, 605 F.3d 1347 (Fed. Cir. 2010) (Plager, J., dissenting), *petition for cert. filed*, 79 U.S.L.W. 3228 (U.S. Sept. 23, 2010) (No. 10-426); *Personalized Media Commc'ns, LLC v. ITC*, 161 F.3d 696, 705–07 (Fed. Cir. 1998) (“digital detector”); *Am. Med. Sys., Inc. v. Laser Peripherals, LLC*, 712 F. Supp. 2d 885, 910–12 (D. Minn. 2010) (“greater than about 90%” and “at least 90%”).

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I hereby certify that concurrence in the service of this document has been obtained from each of the other signatories shown above.

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**CERTIFICATE OF SERVICE**

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on February 24, 2011.

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